



# *COMMONWEALTH of VIRGINIA*

*DEPARTMENT OF ENVIRONMENTAL QUALITY*  
TIDEWATER REGIONAL OFFICE

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**STATE WATER CONTROL BOARD  
ENFORCEMENT ACTION - ORDER BY CONSENT  
ISSUED TO  
Accomack County  
FOR**

**Non Metallic Mineral Mine  
VPDES Permit No. VAG84; Registration No. VAG840249  
Unpermitted Discharge to Streambed**

**SECTION A: Purpose**

This is a Consent Order issued under the authority of Va. Code § 62.1-44.15, between the State Water Control Board and Accomack County, regarding the Non Metallic Mineral Mine located adjacent to 11267 Sand Street, Temperanceville, Virginia, for the purpose of resolving certain violations of the State Water Control Law and the applicable permit and regulations.

**SECTION B: Definitions**

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "305(b) report" means the report required by Section 305(b) of the Clean Water Act (33 United States Code § 1315(b)), and Va. Code § 62.1-44.19:5 for providing Congress and the public an accurate and comprehensive assessment of the quality of State surface waters.
2. "Accomack County" is a political subdivision of the Commonwealth of Virginia. Accomack County is a "person" within the meaning of Va. Code § 62.1-44.3.
3. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
4. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.
5. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.

6. "Discharge" means the discharge of a pollutant, or any addition of a pollutant or combination of pollutants, to state waters or waters of the contiguous zone or ocean other than a discharge from a vessel or other floating craft when being used as a means of transportation.
7. "Discharge of a pollutant" when used with reference to the requirements of the VPDES permit program means:
  - (a) Any addition of any pollutant or combination of pollutants to surface waters from any point source; or
  - (b) Any addition of any pollutant or combination of pollutants to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.
8. "Facility" means the nonmetallic mineral mine located adjacent to 11267 Sand Street in Temperanceville, Accomack County, Virginia, from which discharges of commingled wastewater (i.e. mine pit dewatering and stormwater associated with industrial activity occur.
9. "Impacts" means results caused by those activities specified in § 62.1-44.15:20 A of the Code of Virginia.
10. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
11. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.
12. "Permit" means VPDES General Permit No. VAG84, which was issued under the State Water Control Law and the Regulation on July 1, 2019 and which expires on June 30, 2024. Accomack County applied for registration under the Permit on September 23, 2021 and was issued Registration No. VAG840249 on October 19, 2021.
13. "Pollutant" means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 USC § 2011 *et seq.*)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water... 9 VAC 25-31-10.
14. "Pollution" means such alteration of the physical, chemical, or biological properties of any state waters as will or is likely to create a nuisance or render such waters (a) harmful or detrimental or injurious to the public health, safety, or welfare or to the health of animals, fish, or aquatic life; (b) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (c) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses, provided that (i) an alteration of the physical, chemical, or biological property of state waters or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution but

which, in combination with such alteration of or discharge or deposit to state waters by other owners, is sufficient to cause pollution; (ii) the discharge of untreated sewage by any owner into state waters; and (iii) contributing to the contravention of standards of water quality duly established by the Board, are “pollution.” Va. Code § 62.1-44.3.

15. “Regulation” means the VPDES Permit Regulation, 9 VAC 25-31-10 *et seq.*
16. “State Water Control Law” means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code. Article 2.2 (Va. Code §§ 62.1-44.15:20 through 62.1-44.15:23) of the State Water Control Law addresses the Virginia Water Resources and Wetlands Protection Program.
17. “State waters” means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3.
18. “Surface water” means all state waters that are not ground waters as defined in Va. Code § 62.1-255.
19. “TRO” means the DEQ Tidewater Regional Office located in Virginia Beach, Virginia.
20. “Va. Code” means the Code of Virginia (1950), as amended.
21. “VAC” means the Virginia Administrative Code.
22. “VPDES” means Virginia Pollutant Discharge Elimination System.
23. “VWPP” means Virginia Water Protection Program.

#### **SECTION C: Findings of Fact and Conclusions of Law**

1. Accomack County owns and operates the Facility. The Permit recognizes the discharge of commingled wastewater from the Facility Outfall BP001 to an unnamed tributary that leads to Assawoman Creek and the Atlantic Ocean, in strict compliance with the terms and conditions of the Permit.
2. Assawoman Creek is listed in DEQ’s 305(b) report as impaired for dissolved oxygen and *Escherichia coli* (*E. coli*) and does not support the designated use for aquatic life and recreation.
3. Va. Code § 62.1-44.5 and 9 VAC 25-31-50(A) states that [E]xcept in compliance with a certificate issued by the Board, it shall be unlawful for any person to discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances.
4. Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50(A) states that except in compliance with a VWPP permit, no person shall dredge, fill, or discharge any pollutant into, or adjacent to

surface waters, or otherwise alter the physical, chemical, or biological properties of surface waters of the Commonwealth.

5. On June 21, 2021, Accomack County staff reported a discharge of a pollutant (sediment) from the Facility to state waters. On June 23, 2021, DEQ staff inspected the Facility and observed unpermitted impacts to the state surface water unnamed tributary. According to Accomack County, commingled wastewater (i.e. mine pit dewatering and industrial stormwater) has been discharged as needed for dewatering activities at the Facility. At the date of the release, Accomack County was not authorized to discharge process waste water from the Facility to state waters under the Permit or any other permit.
6. According to an independent contractor, the discharge resulted in the unpermitted impacts to 2,056 linear feet of stream, with a depth of sediment 1 inch to 2 feet in depth.
7. On September 30, 2021, Accomack County provided records of the dates and times that dewatering discharges occurred at the Facility according to the length of time the dewatering pump was in operation for three discharge events since January 2020:
  - a. January 10, 2020 to February 28, 2020, the discharge pump operated 407 hours
  - b. November 2, 2020 to January 30, 2021, the discharge pump operated 479 hours
  - c. June 3, 2021 to June 21, 2021, the discharge pump operated 429 hours
8. On July 2, 2021 and July 6, 2021, DEQ issued to Accomack County NOV No. W2021-07-T-001 and NOV No. 2106-001871 for the VWPP and VPDES program violations, respectively.
9. Accomack County responded to the VWPP and VPDES NOVs on July 7, 2021 by telephone. According to Accomack County staff, on the most recent Facility dewatering event (as listed in C.7.c, above), the Facility water level had dropped more quickly than normal, perhaps due to prolonged dry weather conditions, such that dewatering picked up and discharged significant sand and sediment to the unnamed tributary. Also according to Accomack, Accomack County staff believed the facility to be exempt from permitting if the work was performed by government employees.
10. Va. Code § 62.1-44.5 and 9 VAC 25-31-50(A) states that [E]xcept in compliance with a certificate issued by the Board, it shall be unlawful for any person to discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances.
11. Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50(A) states that except in compliance with a VWPP permit, no person shall dredge, fill, or discharge any pollutant into, or adjacent to surface waters, or otherwise alter the physical, chemical, or biological properties of surface waters of the Commonwealth.
12. Va. Code § 62.1-44.15(5a) states that a VPDES permit is a “certificate” under the statute.

13. The Department has issued no permits or certificates to Accomack County for the Facility other than coverage under the Permit.
14. The unnamed tributary to Assawoman Creek is a surface water located wholly within the Commonwealth and is a "state water" under State Water Control Law.
15. Based on the results of the June 21, 2021 report by Accomack County, the June 23, 2021 DEQ site inspection, the July 7, 2021 meeting, and the records of Facility dewatering discharges provided by Accomack County on September 30, 2021, the Board concludes that Accomack County has violated Va. Codes §§ 62.1-44.5 and 44.15:20, and 9 VAC 25-31-50(A), and 25-210-50(A), by discharging commingled wastewater without a VPDES permit and impacting streambed without a VWPP permit, as described in paragraphs C(5) through C(7), above.
16. On October 19, 2021, Accomack County received coverage for the Facility under the Permit.
17. In order for Accomack County to complete its return to compliance, DEQ staff and representatives of Accomack County have agreed to the Schedule of Compliance, which is incorporated as Appendix A of this Order.

#### **SECTION D: Agreement and Order**

Accordingly, by virtue of the authority granted it in Va. Code § 62.1-44.15, the Board orders Accomack County, and Accomack County agrees to:

1. Perform the actions described in Appendix A of this Order; and
2. Pay a civil charge of \$80,826.00 within 30 days of the effective date of the Order in settlement of the violations cited in this Order.

Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control  
Department of Environmental Quality  
Post Office Box 1104  
Richmond, Virginia 23218

Accomack County shall include its Federal Employer Identification Number (FEIN) 54-6001099 with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF). If the Department has to refer collection of moneys due under this Order to the Department of Law, Accomack County shall be liable for attorneys' fees of 30% of the amount outstanding.

**SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend this Order with the consent of Accomack County for good cause shown by Accomack County, or on its own motion pursuant to the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, after notice and opportunity to be heard.
2. This Order addresses and resolves only those violations specifically identified in Section C of this Order and in VWPP NOV No. 2106-001871 dated July 2, 2021 and in VPDES NOV No. W2021-07-001 dated July 6, 2021. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility; or (3) taking subsequent action to enforce the Order.
3. For purposes of this Order and subsequent actions with respect to this Order only, Accomack County admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.
4. Accomack County consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. Accomack County declares it has received fair and due process under the Administrative Process Act and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.
6. Failure by Accomack County to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. Accomack County shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other unforeseeable circumstances beyond its control and not due to a lack of good faith or diligence on its part. Accomack County shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Accomack County shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days when circumstances are anticipated to occur, are

occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:

- a. the reasons for the delay or noncompliance;
- b. the projected duration of any such delay or noncompliance;
- c. the measures taken and to be taken to prevent or minimize such delay or noncompliance;  
and
- d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto and any successors in interest, designees and assigns, jointly and severally.
10. This Order shall become effective upon execution by both the Director or his designee and Accomack County. Nevertheless, Accomack County agrees to be bound by any compliance date which precedes the effective date of this Order.
11. This Order shall continue in effect until:
  - a. The Director or his designee terminates the Order after Accomack County has completed all of the requirements of the Order;
  - b. Accomack County petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or
  - c. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to Accomack County.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Accomack County from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. Any plans, reports, schedules or specifications attached hereto or submitted by Accomack County and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.

13. The undersigned representative of Accomack County certifies that he or she is a responsible official [or officer] authorized to enter into the terms and conditions of this Order and to execute and legally bind Accomack County to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of Accomack County.
14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.
15. By its signature below, Accomack County voluntarily agrees to the issuance of this Order.

And it is so ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Craig R. Nicol, Regional Director  
Department of Environmental Quality

Accomack County voluntarily agrees to the issuance of this Order.

Date: 12/16/21 By: Michael T. Mason, County Administrator  
(Person) (Title)  
Accomack County

Commonwealth of Virginia  
City/County of Accomack

The foregoing document was signed and acknowledged before me this 16th day of  
December, 2021, by Michael T. Mason who is  
County Administrator of Accomack County on behalf of Accomack County.

\_\_\_\_\_  
Notary Public  
7792167  
Registration No.

My commission expires: July 31, 2022

Notary seal:





## **APPENDIX A VWPP SCHEDULE OF COMPLIANCE**

1. Within 60 days of the effective date of this Order, Accomack County shall submit an approvable Corrective Action Plan (CAP) for the restoration of state waters at the Facility that have been impacted without a Permit that meets the requirements of 9 VAC 25-210-116. The CAP must be sufficient to achieve no net loss of functions in all surface waters in accordance with 9 VAC 25-210-116. Accomack County shall respond to any DEQ Notice of Deficiency regarding the CAP within 14 calendar days.
2. Upon DEQ approval of the CAP, Accomack County shall begin implementation of the Corrective Action Plan in accordance with the schedule contained therein. Any changes to the approved Final CAP or schedule shall not be initiated without advance notice to and approval by DEQ. Accomack County shall complete the CAP in accordance with its terms.
  - a. If the performance criteria specified in the Final CAP are not achieved at the end of the applicable monitoring period, then Accomack County shall so advise DEQ in the applicable monitoring report for that monitoring period and shall describe why it appears the criteria could not be achieved. If DEQ thereafter so directs, Accomack County shall submit to DEQ for review and approval an alternative CAP within 60 days of DEQ's letter requiring the same. The DEQ-approved alternative CAP shall then be implemented by Accomack County in accordance with the schedule set forth in the alternative CAP.
  - b. If the performance criteria specified in the Final CAP or any alternative CAP are not achieved by the end of the last monitoring period and DEQ determines that additional corrective action cannot sufficiently address the reasons for such failures, then Accomack County shall submit to DEQ for review and approval, within 30 days of such determination, a proposal to purchase mitigation bank credits or contributions to an in-lieu fee fund to address any remaining corrective action required in the Final CAP or, as applicable, any previously submitted alternate CAP. Accomack County shall respond to any DEQ notice of deficiency to the proposal in accordance with the terms of the notice. Accomack County shall purchase mitigation bank credits or make contributions to an in-lieu fund, as approved by DEQ in accordance with this paragraph, within 30 days of DEQ approval.
3. If required in accordance with the DEQ approved CAP prepared under Paragraph 2b of this Appendix A, Accomack County shall submit proof of purchase of the specified wetland credits from a DEQ-approved mitigation bank or in-lieu fee fund that is authorized and approved by DEQ to sell credits in the area in which the impacts occurred and has credits available (as released by DEQ) to achieve no-net-loss of existing wetland acreage and no-net-loss of function in all surface waters in accordance with 9 VAC 25-210-116.

4. Unless otherwise specified in this Order, Accomack County shall submit all requirements of Appendix A of this Order to:

VA DEQ – Tidewater Regional Office  
5636 Southern Boulevard  
Virginia Beach, VA 23462